FILE COPY

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1930.

No. [illegible] 60

Chicago and North Western Railway Company,
Petitioner,

vs.

Eugene Bolle,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT, AND BRIEF IN SUPPORT THEREOF.

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Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. [illegible].

No. [illegible]

Chicago and North Western Railway Company,
Petitioner,
vs.
[illegible] Bolan,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

May It Please The Court:

The petition of Chicago and North Western Railway Company respectfully shows to this Honorable Court:

A.

*Summary Statement of the Matter Involved.

Respondent, a common laborer twenty-two years of age, had been in your petitioner's employ for [illegible] weeks as the fireman of a roundhouse heating plant at [illegible], Illinois. The plant heated, by means of steam distributed in permanently placed pipes, the roundhouse and several outlying and nearby buildings, including the passenger de-

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[*] As the Brief, infra, contains a more complete statement of facts, with appropriate references to the record, such references are omitted here. Rule 38, § 2; Rule [illegible].

pot, and, sometimes, intrastate suburban passenger coaches used between Chicago and Waukegan, Illinois. If and when the stationary boiler or furnace of such plant was "out of commission," an ordinary steam locomotive was brought into the roundhouse and was connected with the heat pipes, and plaintiff fired such "heater-engine." In firing the furnace he shoveled the coal from a nearby bin, but when the "heater-engine" was being used, and the coal in its tender ran low, it was necessary to detach the engine from the heat pipes and take it to the coal chutes (a long building beside the tracks, containing about twenty chutes or hoppers, side by side), which were located at a place called Beach, in the Waukegan yards, in the State of Illinois, for a further supply of coal. This was done by coupling it to yard and switching locomotives also needing coal, as they daily did, and proceeding north from the roundhouse to the chutes, the most northerly engine of the string hauling the others, and one of the roundhouse laborers going along in the heater-engine to keep its fire from going out, but neither he nor the heater-engine taking part in the movement, but just being hauled to the chutes and back by the active or operating engines. The actual coaling of all engines at the chutes is done by employes of a contractor, who direct the operating crews of the active or operating engines as to where and when and as to opposite which chute to "spot" the engines, etc. On his first such trip to the chutes, (December 4, 1922, at about 9:15 P. M., dark) plaintiff, not knowing or inquiring as to the method of taking coal, got on top of the heater-engine and pulled the chain of an opposite chute or hopper, and while he was so doing the engines were moved and he was caught between the coal spout or slide and the cab of the heater-engine, one of his legs being thereby so crushed as to necessitate amputation above the knee.

He brought this suit against your petitioner under the Federal Employers' Liability Act to recover damages for his injuries. His case was first tried in [illegible] in the Circuit Court of Lake County, Illinois, and he was given a verdict for $[illegible]. On your petitioner's appeal to the Appellate Court of Illinois, Second District, the judgment on that verdict was reversed and the cause ordered to be remanded on the ground that plaintiff was not, at the time of his injury, engaged in interstate commerce, no other assigned error being considered or decided. But plaintiff moved that the remanding part of such order be stricken so that the case might be taken to the Supreme Court of Illinois on the sole question decided, which motion was granted. Bolle v. C. & N. W. Ry. Co., [illegible] Ill. App. [illegible]; Bolle v. C. & N. W. Ry. Co., [illegible] Ill. App. [illegible]. The Supreme Court of Illinois reversed the judgment of the Appellate Court and remanded the case to that court with instructions to either affirm the trial court judgment or remand the cause for a new trial, holding that the question whether the facts brought plaintiff within the Liability Act was for determination by the jury as a question of fact. Bolle v. C. & N. W. Ry. Co., 324 Ill. 479, 482. Thereupon the Appellate Court refused to affirm the trial court judgment, but obeyed the instructions of the Supreme Court (holding and again publishing its first opinion, that plaintiff was not engaged in interstate commerce) by remanding the cause to the trial court. Bolle v. C. & N. W. Ry. Co., [illegible] Ill. App. [illegible]. Another trial was had in the Circuit Court of Lake County (but before a different judge), at the close of which the court directed a verdict for defendant on the ground that as a matter of law, plaintiff, at the time of his injury, was not engaged in interstate commerce. Plaintiff appealed to the Appellate Court and that court ([illegible] Ill. App. [illegible], abstract not published), reversed and remanded on the ground that the Supreme Court had held (336 Ill. 570), on substantially the same facts, that the interstate commerce question was for the jury, which opinion was binding on it. The case was again tried and plaintiff had a verdict for [illegible] which was affirmed by the Appellate Court. Bolle v. C. & N. W. Ry. Co., [illegible] Ill. App. [illegible], on both the interstate commerce issue and the merits. As to the interstate commerce issue the decision follows that of the Supreme Court, that the question was one of fact for the jury and, therefore, that the verdict could not be disturbed by the court unless it was contrary to the manifest weight of the evidence.

There is no dispute as to the facts bearing on the question of the purpose of or as to what plaintiff was doing at the time of his injury. He was putting coal into a bin, which was a part of the heater-engine, from whence he later would shovel it into the firebox of this heating-plant for the purpose of generating steam to be transmitted through permanently placed pipes to heat buildings and offices and, sometimes, intrastate suburban coaches.

As to the character of plaintiff's work at the time of his injury, whether interstate or not, the situation is exactly the same as though the so-called stationary boiler or heating-plant, with its coal bin, had been installed and maintained as a fixture in the roundhouse, and such fuel had been hauled to the chutes to fill the coal bin, plaintiff using it to keep the fire alive, and being hurt while putting coal into the bin from the chutes. The fact that the heating-plant in use at the time in question happened to be a locomotive or engine in no way changes the situation.

There have been three court decisions that he was not engaged in interstate commerce and two that the question whether the undisputed facts brought him within the Lia-bility Act was for the jury and not for the court. There has been no decision by any court cited by [illegible]

There are also in the case questions of [illegible] exceptions to rulings on admissibility of evidence, improper argument of counsel to the jury, improper instructions and refusals to instruct the defendant's [illegible]

Reasons Relied on for the Allowance of the Writ.

Your petitioner respectfully suggests the following reasons relied on for the issuance of the writ:

1. The state court has decided a federal question of substance in a way not in accord with applicable decisions of this court.

The decision of the Appellate Court, bound by the decision of the State Supreme Court, makes it the law of the state in suits brought under the Federal Employers' Liability Act, even when the facts as to and the purpose of what the employe was doing at the time of his injury are undisputed or even stipulated, that the question of whether such facts bring the parties within the Liability Act is for the ultimate determination of the jury, and the jury's determination of it may not be disturbed unless the evidence in the case was not such that all reasonable minds must necessarily agree that at the time of the accident plaintiff's employment was not such as to bring him within the provisions of the Federal Employers' Liability Act. (This quotation is from the State Supreme Court's decision—[illegible] Ill. [illegible]—and was quoted, adopted and followed by the Appellate Court—[illegible] Ill. App. [illegible]) And [illegible] though this court, on identical or similar facts, may have held that the Act did not apply.

In its opinion, [illegible] Ill. App. [illegible], the Appellate Court quotes and adopts the Illinois Supreme Court's statement of the facts, which included many irrelevant facts ([illegible] Ill. App. [illegible]); and quotes, adopts and adds to that court's statement of the law ([illegible] Ill. App. [illegible]), as follows:

> "Whenever an issue is made in a case, and evidence must be introduced to maintain the issue, controverted questions of fact are involved, which include not only evidentiary facts but ultimate facts, even though there be no conflict in the testimony, or the evidence may be agreed upon or embodied in a stipulation of fact."

In the Appellate Court's opinion no mention is made of the line of authorities actually applicable, although they were submitted to that court in your petitioner's brief therein.

2. On the evidence, plaintiff was not, as matter of fact or law, engaged in interstate commerce at the time of his injury.

3. In the evidence there was no dispute as to the purpose of or what plaintiff was doing at the time of his injury, and the question of whether, on such facts, he was then and there engaged in interstate commerce was for the court and not the jury.

4. Even if the question was one of fact for the jury the verdict is wrong, as has been repeatedly held by this court on like facts.

5. Improper evidence on the subject of interstate commerce was admitted over your petitioner's objections, and was submitted to the jury though the trial court was duly requested to take it from them.

6. The principal negligence alleged and attempted to be proved was that the movement of the engines which caused the injury was started without the ringing of a bell. The only testimony to that effect was plaintiff's, that he didn't hear any bell, but he also testified that he heard no bell before the starting of any other of the many movements, back and forth, and from track to track, prior to the movement in question, and that he [illegible] was not paying any attention to signals of any kind, by bell or otherwise. Notwithstanding which the plaintiff, over your petitioner's objection, was allowed to argue to the jury, repeatedly, in his summation, that plaintiff's witness McManaman, the foreman in charge of the engines, had testified that the bell was not rung. McManaman did not so testify.

7. The trial court refused your petitioner's requests to instruct the jury as (in substance) follows:

a. That unless plaintiff was engaged in interstate commerce he has no cause of action under the Liability Act, but that a finding that he was not so engaged would not deprive him of any other remedy; that they should not consider the effect of such a finding on any other question involved, etc. (No. 6, R. 147.)

b. That if the ringing of the bell would not have prevented the injury they must find for the defendant. (No. 11, R. 150.)

c. That the coupling of the heater-engine to the other engines did not change the character of plaintiff's work, etc. That it was only plaintiff's work that was in question. (Nos. 22, 23, 24, R. 152, 153.)

d. That the fact that these other engines were to be used for themselves engaging in interstate transportation [illegible] [illegible] whether plaintiff was engaged in interstate commerce. (No. [illegible], R. [illegible].)

[illegible] That plaintiff at the time of his injury was not engaged in interstate transportation. (No. [illegible], R. [illegible].)

[illegible] That they should not find from the fact that the heating [illegible] heated buildings and [illegible] [illegible] that plaintiff was engaged in interstate commerce. (No. [illegible], R. [illegible].)

[illegible] That an employe is not engaged in interstate commerce while [illegible] coal for a heating-plant, or while firing [illegible] plant, the purpose of the heat from which is [illegible] buildings in which other employes are engaged in interstate commerce, etc. (No. [illegible], R. [illegible].)

[illegible] That the movement of the four engines coupled together from the roundhouse in Washington to the coal chutes at [illegible] (all within the State of Illinois) was not a movement in interstate transportation. (No. [illegible], R. [illegible].)

[illegible] The trial court erred in instructing the jury as (in substance) follows:

[illegible] That the test of plaintiff's work was whether he was at work for the defendant in interstate commerce or in work so closely related to such commerce as to be practically a part of it," etc. (No. [illegible], R. [illegible].) (Which is an [illegible] [illegible] and wholly erroneous statement of the [illegible] case law, supra.)

[illegible] Same error as in last above, except that the [illegible] [illegible] a part of such commerce" were used. (No. [illegible])

[illegible] Same error except that a more erroneous para- [illegible] (No. [illegible], R. [illegible].)

8. [illegible] in reversing plaintiff's [illegible] the [illegible] [illegible]

9. There was not sufficient evidence in [illegible] to prove that negligence of your petitioner was the proximate cause of plaintiff's injuries.

10. Having himself observed that all of the several prior movements of the engines were started without ringing the bell, plaintiff assumed the risk of further such movements, as a matter of law.

11. Plaintiff testified that several years after the accident his "health fell down" and he had to quit a job he then had. The court instructed the jury that, in assessing damages, they might consider "any loss of health or strength," etc. There was not, in the evidence, any connection between the accident and the [illegible] "falling down" of his health. The damages assessed were [illegible] 500.00, and plaintiff sustained no injury except the loss of his leg.

12. Plaintiff was guilty of contributory negligence that (a) was the sole cause of his injury, or (b) should have mitigated his damages.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Appellate Court of Illinois, Second District, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, and that said decree or judgment of said Appellate Court may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

Chicago and North Western Railway Company,
By Ray N. Van Doren,
Samuel H. Cady,
Counsel for Petitioner.

Nelson J. Wilcox,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 19[illegible].

Chicago and North Western Railway Company,
Petitioner,
vs.
Eugene Bolle,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion in the Appellate Court of Illinois, Second District, is reported in *Bolle v. Chicago and North Western Railway Company*, Advance Sheets, 25[illegible] Ill. App. [illegible]. (Copy of the Opinion, *R. 172-18[illegible].)

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*The references to "R" are to the pages of the Certified Transcript, the first [illegible] of which are the printed "Abstract" used in the Appellate Court. These [illegible] pages are numbered at their tops. The pages of the rest of the Transcript are numbered at their bottoms.

II.

Jurisdiction.

1. Plaintiff's cause of action, if any, and defendant's defenses, if any, depend upon the provisions of 35 Stat. 65, ch. 149 (U. S. C., Tit. 45, secs. 51-59), known as the Federal Employers' Liability Act.

A final judgment has been rendered or passed by the highest court of Illinois in which a decision could be had involving rights, privileges and immunities specially set up and claimed by both parties under the Constitution and statute (35 Stat. 65) of the United States, and this court has jurisdiction to review by virtue of sec. 344 (Judicial Code, sec. 237, amended), U. S. C. A. 28.

2. The date of the judgment to be reviewed is September 22, 1930 (R. 171). The Appellate Court had entered a judgment and opinion on an earlier date (R. 168), but, on defendant's motion for a rehearing, struck it from the files and entered a new judgment and opinion on said date, and denied defendant's motion for rehearing. (R. 170, 171, 172-183, 184.) *But that is not the date from which the statutory period of time within which to make application to this court for writ of certiorari is to be computed, which is February 17, 1931*, as appears from the following:

Thereafter your petitioner duly applied to said Appellate Court for a certificate of importance to the Supreme Court of Illinois, under ch. 110, par. 120, Cahill's R. S. Ill. (See *Minneapolis, etc., v. Rock*, 279 U. S. 410), but the court on October 7, 1930, denied the application. (R. 186.)

Thereafter your petitioner duly applied to the Supreme Court of Illinois for a writ of certiorari to review said cause and said decision and judgment of the Appellate Court, but said Supreme Court denied the application by order duly entered on *February 17*, [illegible] (R. [illegible].)

3. The nature of the case and the rulings below are such as to bring the case within the jurisdictional provision relied on.

4. Cases believed to sustain the jurisdiction:

St. Louis, etc., v. McWhirter, 229 U. S. 265.
Seaboard Air Line v. Horton, 233 U. S. 492, 499.
American Ry. Express Co. v. Levee, 263 U. S. 19, 20.
Minneapolis, etc., R. Co. v. Rock, 279 U. S. 410, 411, 412.

III.

Statement of the Case.

Although a statement of "the matter involved," with a specification (designated as reasons for issuing the writ) of such of the assigned errors as are intended to be urged, is contained in the foregoing petition, yet for more completely informing the Court, and that we may fully comply with the rules, we here give a short *statement of the facts*, with appropriate references to the pages of record, as follows:

Plaintiff was hired to fire a heating-plant in the railroad's roundhouse at Waukegan, Illinois. (R. 33.) This heating-plant was connected by permanently placed underground pipes with and heated, sometimes, suburban coaches and a turntable (R. 73), and the roundhouse, passenger depot, baggage room, foreman's office, a register room, bunk car, carpenter shop and maintenance of way car (R. 69), all except the coaches being stationary buildings (R. 77). The central unit of that plant consisted at times of a "stationary" boiler or furnace, and at other times of a locomotive substituting therefor. He went to work November 15, 1922 (R. 34), and his first five days the locomotive (heater-engine) was the central unit of the plant and he fired it. (R. 78.) Thereafter for several days the furnace was used and then again, the day before and the day of the accident, the locomotive. (R. 78.) When firing the furnace plaintiff shoveled the coal into the firebox from a nearby bin. When the locomotive was used the coal supply was in the bin in its tender and had to be replenished from time to time by hauling the locomotive to the coal chutes located at Beach, Illinois, in the Waukegan yards, about four miles from the roundhouse. Each night the Waukegan yard and switching locomotives, or some of them, went to the chutes to be coaled, so they were used to haul the heater-engines from the roundhouse to the chutes and back. The evening of the accident the heater-engine needed coal, so it was taken out of the roundhouse and coupled to three active locomotives and was by them hauled to the chutes, plaintiff accompanying it to keep its fire going. (R. 26, 31, 52, 57, 62.) It was after 9:30 P. M. (R. 26.) On the way, but before getting to the chutes, water was taken into one or two of the locomotives, plaintiff assisting in putting water into the heater-engine, which operation was interrupted and he got back in the cab and stayed there while the engines were side-tracked to let a train go by. Thereafter the engines started out of the sidetrack and towards the chutes and plaintiff then again got up on top, but on the rim of the coal-bin and just back of the cab, and rode there, hanging onto the roof of the cab, during the rest of the movements, and was there in that place when he got hurt. His explanation of *why* he got up to and so rode in that place is that he thought they were to take more water into the heater-engine, but he admits, and it is the fact, that he could not, and that he knew that he could not, take water into the engine from that place. There was no reason whatever for his being there. (R. 26, 27, 28, 29; 36-7, 38, 39.) After the engines got to the chutes two of them were coaled by and under the directions of "the coal-chute man," (R. 58, 59) not an employe of defendant. (R. 58-9.) While this was going on plaintiff stood on the rim of the coal-bin of the heater-engine. It was dark, the chutes were not lighted and he had no lantern. (R. 27-9.) He says that after the second [illegible] "spotting" he saw a man he thought was his straw-boss Tony on the next engine reach up and pull down a slide, so he did the same, pulling down a slide into his tender, so that he then was between the slide and the cab. (R. 41, 42, 43, 44.) Then the engines were again moved and he was caught and injured. (R. 28.) He testified that at no time prior to the accident were any signals of any kind given, although many backward and forward movements were made; (R. 39, 40) he saw none given by anybody, and heard none, which he explained by saying "I wasn't paying any attention." (R. 40.) There was no other evidence in the case on the subject of *lack* of signals. The man operating the engine that moved the others testified that he rang the bell before each of the various movements (R. 93, 97) and of course all of the movements back and forth through the switches were controlled and made on lantern or other signals, and all of the movements at the chutes were made on the oral instructions (R. 59, 60) of the "coal-chute man." No coal was taken after the accident, and three engines had been coaled before it happened. (R. 63.)

Plaintiff had never before seen the side of a coal chute from which the coal is taken and had no knowledge of how they worked. (R. 34, 35.) The coal-bin of the heater-engine is in the front end of the tender just back of the cab and in front of the water tank. (R. 37.) Water is taken through a hole in the top of the tank, remote from the cab and to the rear of the coal-bin. (R. 38-9.) To get from the place where plaintiff rode, hanging onto the cab roof, to the place to take water into the engine he would have to get down into the front end of the coal-bin and go across to and climb up the back end of it. (R. 46-7.)

Plaintiff testified:

> "On all of this whole trip, from the roundhouse until I got hurt, my engine was just being hauled or

pushed by the other engines. I didn't know anything about operating it. The power wasn't connected up on my engine at any time on the trip from the roundhouse up to Beach." (R. 44.)

Although plaintiff's counsel has greatly stressed the testimony of his witness McManaman, the foreman of the switch crew, an ex-employe at the time of the trial (R. 49), that he saw a man on top of the heater-engine before the movement that hurt plaintiff, in time to do something, but did nothing (R. 60), there is nothing to it, for it is clear from his testimony that he thought the man he so saw was the "coal-chute man," who was himself directing all of the movements of the engines, and, therefore, he expected no movement to be made (R. 60); no member of the switch crew would be endangered by a movement of the engines, and plaintiff was supposed to be and should have been in the cab of the heater-engine. (R. 60-63.) Neither the coal-chute man nor the operator of the engine who moved it at the time in question *could* see Bolle from their positions. This is clear and undisputed. (R. 63, 91, 94, 95, 107-8, 118.)

IV.

Errors Intended to be Urged.

In our petition we have stated, in numbered paragraphs, the "reasons relied on" for the issuance of writ of certiorari. They constitute a specification of such assigned errors as are intended to be urged. However, for compliance with the rules, we here, more briefly, designate such errors:

1. The trial court should have instructed the jury to return a verdict in favor of defendant, and the Appellate Court should have so held. (R. 130.)

2. On the undisputed evidence as to what plaintiff was doing at the time of his injury he was not within the Federal Employers' Liability Act.

3. The question of whether the facts brought plaintiff within the Liability Act was one of law for the court.

4. No actionable negligence of defendant was proved.

5. Plaintiff assumed the risk.

6. Plaintiff's own negligence was the sole proximate cause of his injury.

7. The trial court admitted improper evidence over defendant's objections.

8. The trial court allowed misstatements of the evidence to be made to the jury over defendant's objections.

9. The trial court improperly instructed the jury and improperly refused to give instructions duly requested by defendant.

10. Excessive damages were awarded, due to improper instructions on the subject and to passion and prejudice of the jury.

All of the foregoing errors, with others, were properly assigned in the Appellate Court. (R. 156-60.)

V.

Argument.

A.

The plaintiff has no cause of action under the Federal Employers' Act, because he was not engaged in Interstate Commerce at the time of his injury.

D. L. & W. v. Yurkonis, 238 U. S. 439.
Shanks v. D. L. & W., 239 U. S. 556.
C. B. & Q. v. Harrington, 241 U. S. 177, 180.
Illinois Central v. Cousins, 241 U. S. 641.
M. & St. L. v. Nash, 242 U. S. 619.
B. & O. v. Branson, 242 U. S. 623.
Heed v. Indus. Comm., 287 Ill. 505.
Great Northern v. King, 161 N. W. (Wis.) 371.

"The true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate TRANSPORTATION or in work so CLOSELY related to IT as to be practically a part of it."

Shanks v. D. L. & W., 239 U. S. 556, 558.

The *Shanks case* was decided in January, 1916, and this court has consistently ever since adhered to that test.

The *relation* to interstate transportation, which is the second or alternative part of the test, must be *close and direct*.

C. B. & Q. v. Harrington, 241 U. S. 177, 180.

There can here be no contention that plaintiff was "at the time of his injury engaged in interstate transportation," and it follows that unless he was engaged "in work so closely related to it [interstate transportation] as to be practically a part of it [interstate transportation]" he was not within the Act because the facts do not satisfy the test.

That the *Shanks case* test, when applied to the facts in this case, demonstrates our proposition seems *clear* from the decisions of this court in cases involving similar facts.

"As was held by the Appellate Court of Illinois in its first two decisions, this case is governed by and is indistinguishable from, on facts and law, this court's decision in *Illinois Central v. Cousins*, 241 U. S. 641, reversing the Supreme Court of Minnesota's affirmance of a *judgment* for damages for personal injuries sustained by an employe while he was wheeling a barrow of coal to the railway company's repair shops for use in stoves which heated such shops, and in which shops other employes repaired interstate equipment and were within the second part of the *Shanks case* test. The trial court had held as a matter of law that Cousins was engaged in interstate commerce, and the Minnesota Supreme Court had affirmed (*Cousins v. Ill. Cent.*, 126 Minn. 172) believing that the *Pederson case* (229 U. S. 146) governed and on the theory that because the men in the shops were engaged in interstate commerce Cousins also was so engaged while getting coal to keep them warm, saying: "The repairs could not be made unless the shop was heated." The reversal by this court, by per curiam decision, was "upon the authority of" this court's decisions in the *Yurkonis* (238 U. S. 439) and *Shanks* (239 U. S. 556) cases, in which it was held that the work of the employe was too remote from interstate transportation to be practically a part of it."

In the *Yurkonis* case, *supra*, the employe was mining coal thereafter to be used in engines engaged in [illegible] purposes.

In the *Shanks* case, *supra*, the employe was changing the location of a shaft that communicated motive power to machinery used to repair interstate locomotives in the shop provided for that purpose. *Usually* his work consisted in repairing such locomotives. This court held that his usual work was immaterial, and that he was not engaged in interstate commerce while changing the location of the shaft.

Furthermore, in the case at bar, the decision below is based upon evidence that plaintiff, when not firing the heating-plant or getting coal for it, sometimes performed such work as "watching engines in the roundhouse, sanding them, turning turntables, and other duties in the roundhouse with reference to engines engaged in both interstate and intrastate commerce." The State Supreme Court included those facts in its statement of facts (334 Ill. 479, 480) and the Appellate Court quoted and adopted them as its statement of the facts. (258 Ill. App. 546, 551.) In other words, the Illinois courts hold that this jury verdict properly overrules this court's decision in the *Shanks case*. The case at bar is stronger for the employe than that case, for here plaintiff's "usual" employment was that of janitor of the heating-plant and the other work he did was incidental or accidental and performed only when Tony, his straw-boss, was occasionally absent from the roundhouse for short times. (R. 23.)

That it was plain error to consider as determinative of the question of the character of plaintiff's work, any evidence except that bearing on the service he was performing when hurt, is beyond question.

Shanks v. D. L. & W., 239 U. S. 556.

Congress had the power to regulate the liability of carriers for injuries to employes engaged in general work pertaining to both classes of commerce, whether the particular service performed at the time, isolatedly considered, is in interstate or intrastate commerce, but *it did not exercise that power* but confined the liability to injuries occurring to employes *when the particular service in which they are employed at the time of injury is a part* of interstate commerce.

Illinois Central v. *Behrens*, 233 U. S. 473-7, 8.

And this jury verdict is also held to properly overrule this court's decision in the *Cousins case, supra*, in being, partly at least, based upon the fact that the heat from this roundhouse heating-plant warmed buildings in which other employes were engaged in interstate commerce. See decision of the Illinois Supreme Court, 264 Ill. 479, 481; and of the Appellate Court, adopting the same statement of facts, 232 Ill. App. 545, 551.

In the case at bar the jury were allowed to consider the fact that the roundhouse heating-plant heated the passenger depot as determinative of the character of plaintiff's work. And this although your petitioner duly requested the trial court to instruct the jury that the heating of the depot must not be so considered. This was a further overruling of the decisions of this court.

In *M. & St. L. R. R. Co.* v. *Nash, Admr.*, 242 U. S. 619, this court reversed the Supreme Court of Minnesota in a case in which the employe was injured while engaged in transporting an outhouse to a station where it was to be installed for the convenience of interstate passengers and others. The Minnesota court held that Nash was engaged in interstate commerce, because:

> "The station buildings and the outhouses connected therewith are provided for the accommodation of interstate as well as intrastate passengers, and are unquestionably used in connection with interstate commerce." (154 N. W. 957.)

But this court reversed, by *per curiam* decision, upon the authority of the *Yurkonis* (238 U. S. 439), *Shanks* (239 U. S. 553) and *Harrington* (241 U. S. 177-180) *cases*, citing also the *Cousins case*, 241 U. S. 641.

There can be no difference in legal effect between the conveniences of heat and toilet furnished in passenger depots. The work of the employes in connection with furnishing the warmth and such *other comforts has no relation to interstate transportation.* There are several decisions by State courts that employes, while building fires in heating plants or stoves in depot buildings, shops and offices, are not engaged in interstate commerce.

Head v. Indus. Comm., 287 Ill. 505, 506-7.
Benson v. Bush, 178 Pac. ([illegible]) 747, 748-9.
Great Northern v. King, 161 [illegible] W. (Wis.) 371, 372.

Attention is called to certain arguments of plaintiff's counsel to the jury on the interstate commerce feature of the case. (R. 132, 133.) They show how plaintiff's counsel was able to and did take advantage of these errors of the trial court. They emphasize and demonstrate that the errors were highly prejudicial. He argued, among other things, as follows:

1. That if the heating-plant heated nothing but the passenger depot plaintiff was engaged in interstate commerce in hauling coal to and firing such plant, "for the convenience and comfort of their passengers" and the employes in the depot "taking care of their interstate business."

3. That "Belle was supplying heat to this passenger station, *where its interstate passengers were conveniently accommodated*, and where they sold tickets and transmitted messages *and carried on business that took care of the interstate commerce of the defendant.*"

There is a distinct line of authorities by this court in which this case belongs. They are cited under the caption of this part of this brief. Not one of them is cited or referred to and they are wholly ignored in the opinion below.

The decision and opinion of the Appellate Court when this case was first before it was right, and that opinion was refiled and re-entered by that court after the decision by the Supreme Court of Illinois. In it the court said that this case is not distinguishable from *Illinois Central R. Co. v. Cousins*, 241 U. S. 641. See *Belle v. C. & N. W. Ry. Co.*, 235 Ill. App. 380, 383. On the second trial the trial court ruled that the *Cousins* decision governed, rather than the unhappy decision of the Supreme Court of Illinois, and directed a verdict in favor of the defendant. It is only fair to the Appellate Court to say that it probably is of the same opinion now as at the time of its two former opinions. (s. c. 235 Ill. App. 380; 246 Ill. App. 31; 251 Ill. App. 623) In its filed but not published opinion of January 31, 1921, 251 Ill. App. 623—when the case was remanded to it by the State Supreme Court, the Appellate Court said:

> "The action of the trial judge in directing a verdict in favor of appellee was based upon his conclusion that the appellant was not engaged in interstate commerce when he was injured. When the case was before us on the former appeal, we reached the same conclusion and so expressed it. However, the Supreme Court took a different view * * * It would seem to follow as a logical conclusion that if the Appellate Court erred in holding the plaintiff was not engaged in interstate commerce, then the trial court erred in holding that he was not so engaged. The Supreme Court held the ques-

tion was one of fact to be submitted to a jury. It is therefore necessary to reverse and remand the cause so that the issue may be tried by a jury."

We believe that a reading of the first opinion of the Appellate Court, 235 Ill. App. 550, 551-4, 556 (re-adopted and again filed and entered as that court's opinion in this case, 246 Ill. App. 31) convinces that, as to the interstate commerce feature, it correctly states the facts and law of this case.

2.

When the facts as to what the employee was doing at the time of his injury are not in dispute the question whether such facts bring the parties within the Liability Act is for the court. It is a question of law.

Illinois Central v. Behrens, 233 U. S. 473.
P. & R. Ry. Co. v. Hancock, 253 U. S. 284.
Erie v. Van Buskirk, 228 Fed. 489-90, 493.
C. N. O. & T. P. v. Hall, 243 Fed. 76, 80.
Clemence v. H. & M. R. Co., 11 Fed. (2d) 913.
Youngstown v. Halverstadt, 12 Fed. (2d) 995, 997.
Wallace v. N. Y. etc., 121 Atl. (Conn.) 878.
Johnston v. C. & N. W. Ry. Co., 229 N. W. (Ia.) 257.
Efaw v. Indus. Comm., 227 N. W. (Wis.) 249.

In *Illinois Central R. Co. v. Behrens*, 233 U. S. 473, 475, the Circuit Court of Appeals certified to this court a short statement of the facts and asked this court whether, on such facts, the employe was engaged in interstate commerce within the meaning of the Employers' Liability Act. The question was one of law and was so treated and answered by this court under section 239 of the Judicial Code. By that section none but questions of law may be asked of or answered by this court. It cannot and will not pass upon "questions of fact or mixed questions of law and fact, but only upon a 'clean-cut question of law.'" *United States v. Meyer*, 255 U. S. 60; *Stratton's Independence v. Howbert*, 231 U. S. 399; *Graver v. Faurot*, 162 U. S. 435; Note 2, Fed. Stats. Ann. 2d Ed., vol. 6, pp. 540, 541, citing nine decisions of this court citing and following *Graver v. Faurot*, *supra*.

In *P. and R. Ry. Co. v. Hancock*, 253 U. S. 284, 285, a case involving the question whether an employe came within the Liability Act, this court said:

> "The essential facts are not in controversy; the nature of the employment, therefore, is a question of law."

In the decisions by inferior Federal and state courts hereinbefore cited to this point, it was *held error to submit the question to a jury* when the *facts* of the work and its purpose were not disputed. That it *must* be decided as a matter of law.

The law on the subject of what constitutes a question of fact for the jury under the Liability Act, as stated by the Supreme Court of Illinois is said to be (324 Ill. 479, 482) as follows:

> "Whether or not at the time of the accident plaintiff was employed by defendant in interstate commerce was a controverted question of fact upon which plaintiff had a constitutional right to a trial by jury. This question of fact was the main issue in the case. Whenever an issue is made in a case and evidence must be introduced to maintain the issue, controverted questions of fact are involved, which include not only evidentiary facts but ultimate facts, even though there be no conflict in the testimony."

The Appellate Court, [illegible] Ill. App., at page [illegible], quoted, adopted and applied the above quoted rule, commenting with the words "Whenever an issue is made," and added to it the following:

> "* * * or the evidence may be agreed upon or embodied in a stipulation of fact."

The probable explanation of this curious rule is that the State Supreme Court was inadvertent. But, the Appellate Court has adopted it, with the addition above quoted, and the State Supreme Court has perpetuated the inadvertence, or whatever it was, with the addition, by denying review. In any event, it is at present the law of Illinois in actions under the Liability Act so far as its courts can make it so. It must be corrected if there ever hereafter is to be any but a jury decision in Illinois on this vital question. And there never will be a jury verdict in favor of a railroad in any such case submitted to the jury as this one was submitted. It would seem that as a matter of self-defense this court should review and reverse this judgment. Every interstate carrier subject to suit in the courts of Illinois is adversely affected by the decision of the court below, and it will be of immense benefit to the bench and bar of the country at large if this court again will state the true rule, so that there may be no further confusion such as the case at bar exemplifies.

In any event, this court will, if it grant the writ prayed for, examine the record, analyse the evidence, and decide whether this plaintiff was or was not at the time of his injury engaged in interstate commerce, and the verdict of the jury will not preclude it from doing so.

Yazoo & M. V. R. Co. v. Mullins, 249 U. S. 531, 533.
Baltimore & Ohio v. Burtch, 263 U. S. 540, 542.

Substantive rights may not be impaired under the name of procedure.

Atlantic, etc. v. Burnette, 239 U. S. 199.

We insist that there is no evidence in this case tending to show that plaintiff was engaged in interstate commerce.

N. C. R. R. Co. v. Zachary, 232 U. S. 248, 258.

The question is one in which the Nation is interested, and the controlling law should be uniform and not change at every state line.

N. Y. C. v. Winfield, 244 U. S. 147, 149.

A Federal right has been denied this defendant by the verdict of a jury which is without support in the evidence.

Southern Pacific v. Schuyler, 227 U. S. 601, 611.

C.

Defendant Not Negligent.

No employe of defendant present at the time of this accident knew or had any reason to believe or even suspect that plaintiff was or would be at the place where he was at that time.

The fact that plaintiff's witness McManaman, the foreman of the switch crew, saw "a man" on top of the engine a brief period of time before the movement does not make this a "discovered peril" case, or indicate any negligence on the part of that witness. It was a dark night and there were no lights (R. 63-4). He thought that the man he saw was the coal-chute man. He testified that there was no reason why any other person except the coal-chute man should be there (R. 61); that customarily the "engine-riders" would be in their cabs (R. 62); that he and his helper were just standing there, some distance away from the engines, waiting for the coal-chute man to finish the coaling. (R. [illegible].)

It is uncontradicted that neither the coal-chute man nor the man who started the engines at the time in question saw or could have seen the plaintiff. (R. [illegible], 107-8, 118.)

Negligence is the basis of all liability under the Liability Act, and there can be no recovery where it is absent.

C., M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472.

The reasonable man will order his precaution by the measure of what appears likely in the known course of things.

Atchison, etc. v. Calhoun, 213 U. S. 1, 9.

There is no liability unless the injury in the way it occurred might reasonably have been anticipated. Applied here this means that there was no actionable negligence.

Gulf, etc. v. Wells, 275 U. S. 455, [illegible].
P. & R. Ry. Co. v. Allen, 9 Fed. (2d) [illegible].

Even if the engine bell was not rung, and there was evidence to support the claim that it should have been, such failure was not a violation of any duty owed to plaintiff. Any such signal, as a warning that the engines were to be moved, was for the switch crew, who might be on the tracks or in other positions of danger.

C. & O. v. Mihas, 280 U. S. 102, 105.

Plaintiff testified he knew nothing of the rules (R. [illegible]) and never had a book of rules (R. [illegible]), so it is plain that, at the time, he did not rely upon it or them.

D.

Plaintiff a Volunteer, Injured by His Own Act.

Plaintiff had no duty to perform in connection with the coaling operation. When he reached up and pulled the chain and let down the coal-slide so that he was between it and the engine cab (R. 43), he was a mere volunteer, no matter what he says about *thinking* it was his duty; and it was his own conduct that was the sole cause of his injury.

2 Roberts Fed. Liab. Carriers, 2nd Ed. sec. 874.
Great Northern v. Wiles, 240 U. S. 444.

E.

Contributory Negligence.

In no aspect of the case can the conclusion that plaintiff was guilty of contributory negligence be escaped. His own story convicts him of it. Yet the jury assessed more than full damages for his injury. Defendant's requests (R. 155) that the trial court instruct the jury that plaintiff was guilty of contributory negligence as a matter of law and that they should reduce the damages accordingly should have been granted. To refuse them was error.

F.

Plaintiff Assumed the Risk.

On plaintiff's own story he assumed the risk of a movement of the engines, even without prior signal by bell.

He put himself in a little foot-square space, between the coal-slide and the cab of the hauler-engine, where, it was plainly obvious to anyone, if the engines moved in either [illegible] would be [illegible] direction he was bound to be hurt. And this although, as he testified, he had already observed that the engines were being moved back and forth without signals of any kind.

The case cited, quoted from and relied upon by the Appellate Court in denying defendant's contention as to this (259 Ill. App. 546, 557-8; R. 179) is in truth an authority for, and not against, such contention. In it, at least in one place, the Federal rule is correctly stated to be that the employe does "not assume the *risk of an unexpected negligent departure from the customary method of doing* * * * dangerous work." But the situation here was not such. Plaintiff testified, on his direct examination:

> "After the through train went through * * * I got back upon the tender * * * [The engines] went to the crossover switch and then came south; they took the crossover switch, * * * got on the east track; then they pulled south towards the coal chute. * * * After the first engine was coaled they moved south several feet (R. 27). * * * I did not receive any notice or warning that the movement [the movement that caught him] was to be made (R. 28)."

On his cross-examination he testified:

> "I again got upon the top of the tender * * * hanging onto the roof of the cab. That was not where you take water, but I said that my reason for getting up on the tender again was to take water. I stood there on that shelf while the engines came out from the side-track, and until they got on the main track, and * * * north to up beyond the coal chutes. * * * We had to go through a switch to go out of the side-track, and through a switch to get north of the crossover, and back through the same switch south. Going through all that number of switches I was standing up there on this little shelf. We went by the water pipe where I had taken water, without slowing down or stopping, and I stayed up there * * * not where they take water, for the purpose of taking water. * * * During that trip,

[illegible] the side-track and [illegible] past the [illegible] I saw [illegible] crew or by any- [illegible] member of [illegible] anybody [illegible] engines to [illegible] I did not at [illegible] pay any attention [illegible] (R. 40). * * * [illegible] I took the [illegible] other per- [illegible] and nobody [illegible] south from [illegible] they first [illegible] any engine [illegible] shed I think. [illegible] during the [illegible] most southerly [illegible] to take coal [illegible] moved sev- [illegible] I didn't [illegible] for the [illegible] know of [illegible] most south- [illegible] the chute [illegible] giving any [illegible] south that time." (R. 40).

[illegible]

[illegible] defend- [illegible] which [illegible] appealed [illegible] (R. 90 [illegible] examination [illegible]

[illegible] over defendant's objection to which it was made subject (R. [illegible]) and read to the jury and into the record (R. [illegible].) See [illegible] of this brief, supra.

Later, at the proper time, defendant requested the court to exclude such evidence by instruction to the jury, which was refused. (Ins. 25, 26, R. 153-4)

X.

Refusal to Instruct, and Instructions Given.

If, under the Liability Act, this case was properly for the jury, yet it should have been submitted to the jury with proper instructions as to the law.

It may not always be error to instruct, generally, if no specific requests are made, but if they are made they must be given if they are in accord with the Act and the interpretations of this court.

Seaboard, etc. v. Horton, 233 U. S. 492, 502, 503-4.

Gulf, etc. v. Moser, 275 U. S. 133, 136-8.

1. Refusals of Defendant's Requests.

We respectfully urge that the trial court should not have refused to give to the jury defendant's requested instructions numbered 6 (R. 147) and 21 (R. 152). At least one of them should have been given as a matter of fairness to the jury as well as to the defendant. Illinois has a Workmen's Compensation Act, which is applicable to the parties herein if the Liability Act is not, and the jury was entitled to know that a finding that plaintiff was not within the latter would not [illegible] [illegible] [illegible] under the former. No. 21 (R. 152) was merely a fair request.

No. 11 (R. 159) was to tell the jury that even if they found that the bell was not rung, yet if they also found that ringing it would not have prevented plaintiff's injury their verdict should be for the defendant. The requested instruction applied the correct rule of proximate cause to the facts and should have been given.

No. 20 (R. 159). To refuse to give this instruction was plain and prejudicial error. The movement of the four engines coupled together from the roundhouse to the coal chutes was not a movement in interstate transportation. This is obvious. Three of the engines were yard or switch engines, sometimes in their regular work moving goods containing interstate shipments, while the fourth was this heating-plant on wheels. The movement was wholly within the State of Illinois, and was in fact but a yard-movement (both the roundhouse and the coal chutes being in the Waukegan yards), conducted and participated in by the yard switching crew only (R. 87). Nothing was being transported by any of them. They were being coaled for their regular work. If any of the employes on any of those other engines was at the time engaged in interstate commerce it was not because his work was in interstate transportation, but because it was so closely related to it as to be practically a part of it. *Shanks v. D. & L. W.*, 239 U. S. 556. Relying on the refusal to give this instruction plaintiff's counsel aggravated the error of the Court by arguing to the jury that this movement was a movement in interstate commerce (R. 169), saying that the active or operating engines, that hauled the heater-engine to the chutes "had interstate commerce work mapped out for them; * * * supplying those engines with coal and water for use in interstate commerce of course is employment in interstate commerce" * * * Bolle was placed in this string of engines, and while he had nothing to do with the movement of it, he was none the less engaged in a movement of interstate commerce, which was a part of that movement. Would it be pleased to hold that all of these other employes on these engines were engaged in interstate commerce, but that Bolle alone was not so engaged. No reasonable man would single out Gene Bolle on this movement, and say that he was not (so) employed when the other employes were," etc.

Nos. 12 (R. 132-3), 15 (R. 133) and 16 (R. 133-4) were requests to instruct the jury that (*a*) the physical coupling of the heater-engine to the yard engines did not change the character of plaintiff's work and bring what would otherwise have been work outside of interstate commerce within the Act; (*b*) that it was only the work that plaintiff himself was doing that was material to the question of whether the Act applied to him; (*c*) that the coaling of these other engines for later interstate transportation had no bearing on the character of plaintiff's work. To refuse to give these instructions was error so plain as *not* to admit of argument. Plaintiff had nothing to do with operating or coaling the other engines (R. 44) and nothing to do with any transportation they might later be engaged in.

Plaintiff was not a member of the crew of a train carrying interstate goods or going from *one state* to another; he was not a member of *any crew*. If the character of the work of those other employes has a bearing on or determines the character of *plaintiff's* work it would seem that if the engine being repaired in either the *Winters case*, 242 U. S. 353, 355, or the *Davis case*, 259 U. S. 182, had happened to be physically attached to an engine undergoing "light repairs" by other employes, and which had been interrupted in an interstate trip therefor, Winters and Davis, by virtue of that physical attachment, would have been within the Act; which seems preposterous indeed.

No. 27 (R. [illegible]) requested the court to instruct the jury that plaintiff was not at the time of his injury engaged in interstate transportation, and it was plain error to refuse it. To come within the *Act* the employe must be either (*a*) engaged in interstate transportation, or (*b*) in work so closely related to interstate transportation as to be practically a part of it. As there was no interstate transportation involved in any work plaintiff was doing or ever did do, and the only possible way he could come under the act would be because some part of his work was so closely related to interstate transportation as to be practically a part of it, it was prejudicial error to refuse to instruct the jury accordingly. *Shanks v. D. L. & W.*, 239 U. S. 556, 558; *C. B. & Q. v. Harrington*, 241 U. S. 177, 180.

Plaintiff's counsel emphasized this error and made certain its effect upon the jury by arguing (R. [illegible]) that defendant's counsel "goes throughout his argument the word 'transportation,' as if the word 'transportation' added some clause to the definition. Interstate commerce is a good deal more than transportation. The Federal statute uses the word 'interstate commerce.' *Listen to the court's charge on that subject. When the court, in his instructions, tells you what the law is, he will give you the language of the Federal statute, and the word 'transportation' is not in it.*"

No. 33 (R. [illegible]) requested an instruction that the fact that the heating-plant heated buildings or stationary departments however did not bring plaintiff within the Act. This instruction should have been given upon the authority of the *Shanks* case and other cases *supra*.

No. 37 (R. [illegible]) was an elaboration of No. 33 and was a direct application of the *Shanks* case, *supra*, to the facts in the case at bar. Refusal to give it was a reversible and overruling of that decision. It was similarly [illegible] to properly state to the jury the law as laid down by the court in the [illegible] case applied to the facts of the case at bar.

5. Erroneous instructions given.

No. 14 (R. 187-8) instructed the jury that the test of whether plaintiff was engaged in interstate commerce was whether he was (1) employed by and was at work for the defendant in interstate commerce, or (2) in work so closely related to such commerce as to be practically a part of it.

This court has very patiently and persistently pointed out, in the *Shanks* case and the many cases following it, that that is not the true test. *Shanks v. D. L. & W.*, 239 U. S. 556, 558. In them it is always said that the *true test of employment in such commerce in the sense intended is*, "was the employe * * * engaged in interstate *transportation* or in work so closely related to *it* as to be practically a part of it."

The instruction told the jury that the test of whether plaintiff's work was in interstate commerce is whether it was in interstate commerce, which is, of course, wholly meaningless, or "in work so closely related to *such commerce*," etc., which is not the true test. If it were, the test would enlarge the scope of the Act, which provides that the work must be *in* interstate commerce—*not practically a part of it, but in it.*

No. 15 (R. 188) was a similar paraphrase of the [illegible], but using the word "substantially" instead of "practically" in the second part of it, and was to that degree [illegible] improper. When a paraphrase is used it should be [illegible] and not varied by another [illegible] the original.

No. 26 (R. 160) was also a corrupted and erroneous paraphrase of the *Shanks case test*, but much worse than the two above referred to. It told the jury that plaintiff's work was in interstate *commerce* if it were "*performing a service for the defendant which was reasonably necessary in aid and furtherance of interstate commerce.*"

In *Industrial Comm. v. Davis*, 259 U. S. 182, 186, 187, the *Shanks case test* is quoted and adopted, and it is carefully explained that employes may not be within the Act even when performing work in shops which are accessories to interstate commerce and necessary to it, for *all* employes of interstate railroads are necessary to such movement, but that they are only within the Liability Act when within the "*transportation*" test, which is the true test.

The instruction complained of, in the light of these decisions, is not only incorrect, but almost meaningless, and well calculated to and undoubtedly did mislead the jury, especially when coupled with counsel's argument to the jury that the word "*transportation*" is not to be found in the Act and that the court would so instruct, etc. (R. 185).

I.

Error in Overruling Objections to and *Allowing* Misstatements of *Facts* to be made to the *Jury*.

One of the witnesses for plaintiff was McMenamin, defendant's switch *foreman* in charge of the movement of the engine to and from the coal-chute. *Negligence* was charged against the defendant for moving the engine at the time in question without first ringing a bell. *McMenamin was not asked and did not testify with reference to that matter.* Plaintiff's counsel, in his argument to the jury, stated that McMenamin had testified that the bell was not rung.* Defendant's counsel objected to the misstatement and the trial judge stated that he did not remember that the witness had so testified, whereupon plaintiff's counsel again and emphatically stated that he had, and defendant's counsel again objected, but was overruled (R. 180, 181). The testimony was being taken by the court's official reporter, but he was not consulted, and the court, over defendant's objections, allowed counsel to argue, again and again, and to repeatedly state positively that [illegible] had so testified (R. 181-2). The record was duly protected in accordance with the Illinois practice and the alleged error was passed upon by the Appellate Court adversely to defendant. The only testimony that the bell was not rung was that of plaintiff himself, which was negative and so weak as not to amount to even a scintilla of evidence. (R. 39, 40, 48). Added importance is given this error and the error of the Appellate Court's holding with reference to it by the Appellate Court's decision on the question of assumption of risk, to the effect that it had been *customary* to ring a bell and that *therefore* plaintiff did not assume the risk caused by a failure to follow such custom; 258 Ill. App. 545, commencing at bottom of page 556, and especially the case supposed to govern, *Walewski v. Ill. Cent.*, 220 Ill. App. 113, 118 (R. 178-9), and the quotations, commencing with the last paragraph on page 557, from that case. The Appellate Court (*top of p. 557*) says:

> "The testimony on the part of appellee [plaintiff] is to the effect that no warning, by the ringing of a bell or otherwise, was given prior to the movement of

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*"It was not necessary to constantly interrupt counsel and repeat the same objection after a ruling had once been obtained. Such conduct on the part of counsel for defendant would have been improper, and no right was lost by failing to adopt such a course." *Chicago, &c. v. Louck*, [illegible] Ill. 176, 180.

[illegible] the engine which resulted in his injury. The eviden
[illegible] of appellee was to the effect that the w
[illegible]. It was therefore a question for the jury as
whether said bell was rung or other warning given."
[illegible]

In view of the above quotation we fail to understand how that court could come to the conclusion that the error of the trial court in overruling defendant's objections and allowing counsel to make and repeat the misstatements in question was other than highly prejudicial to defendant. The plaintiff's right to recover, if he had any, depend upon the claim that a bell was not rung before the engine [illegible] in question was started. There can be no doubt that the argument complained of convinced the jury that [illegible], the man in charge of the engines, testified that the bell was not rung. In the Appellate Court counsel for plaintiff conceded that the witness did not so testify (R. 333), and such is the fact.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that justice may be done in this case and that a confusing situation in the courts of the State of Illinois may be cleared up; and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Appellate Court of Illinois, Second Division, and finally reverse it.

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